UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COASTAL MARINE SERVICES, INC.	)	
	)	**CASE 21-CA-139031**
and	)	
	)	
INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS AND ALLIED WORKERS, LOCAL 5	)	

RESPONDENT COASTAL MARINE SERVICES, INC.'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Respondent Coastal Marine Services, Inc. (CMSI or Respondent) submits this reply brief to counsel for the General Counsel's (General Counsel) answering brief to CMSI's exceptions to Administrative Law Judge Robert A. Giannasi's (the judge) March 1, 2016 Decision (Decision). The judge's Decision incorrectly found that Respondent's bilateral arbitration agreement (the Agreement) and its class action waiver unlawfully restricted concerted activities under the National Labor Relations Act (the Act).

II. REPLY ARGUMENT

The General Counsel's arguments in response to CMSI's exceptions to the judge's Decision are unpersuasive and should be rejected for the reasons set forth in CMSI's exceptions brief and below.

A. This Case is not Controlled by *D.R. Horton* or *Murphy Oil*

In its answering brief, the General Counsel asserts that the instant case is controlled by the Board's decisions in *D.R. Horton* and *Murphy Oil*. Those cases are easily distinguishable, however, because CMSI's Agreement includes an opt-out provision allowing employees the opportunity to preserve any procedural right to bring a class or collective action. Neither *D.R. Horton* nor *Murphy Oil* address arbitration agreements that contain opt-out provisions to class action waivers.

Rather than infringing upon employees' Section 7 rights, CMSI's Agreement protects employees' ability to elect to engage in class actions (which the Board has incorrectly classified as protected activity), or elect to "refrain from any or all of such [protected] activities," as is their right. See 29 U.S.C. § 157. That is, under the Act,

employees have a right to choose *not* to engage in the alleged protected concerted activity of preserving their rights to file a class action. Id. The opt-out provision allows employees to preserve their ability to engage in this certain protected activity or to refrain from doing so.

Accordingly, this case is not controlled by *D.R. Horton* or *Murphy Oil*.

B. <u>The Opt-Out Provision Supports Enforceability of the Agreement</u>

Not only does the inclusion of an opt-out provision in the Agreement distinguish this case from *D.R. Horton* and *Murphy Oil*, it serves as yet another reason to enforce the Agreement.[1] The Ninth Circuit Court of Appeals has expressly refused to expand *D.R. Horton* where the employee was given the opportunity to opt out of the arbitration agreement containing a class action waiver and chose not to exercise that option. See *Johnmohammadi v. Bloomingdale's*, 755 F.3d 1072, 1075 (9th Cir. 2014) ("We can quickly dismiss any notion that Bloomingdale's coerced [the plaintiff] into waiving her right to file a class action. Bloomingdale's did not require her to accept a class action waiver as a condition of employment, as was true in [*D.R. Horton*].").

Applying the same logic, at least two administrative law judges have refused to apply *D.R. Horton* when an employer allowed employees to opt out of the employer's arbitration provision because such an opportunity made the provision voluntary and, therefore, lawful. In *Bloomingdale's, Inc.*, Case 31-CA-071281 (June 25, 2013), ALJ Jeffrey D. Wedekind explained that "there could be very real and adverse consequences, not only for existing arbitration agreements, but also for future agreements," if *D.R. Horton*

[1] Importantly, Respondent does not maintain that the opt-out provision is the sole reason the Agreement is enforceable. As argued in CMSI's exceptions brief, the Fifth Circuit and countless other Federal courts have found employment arbitration agreements containing class action waivers enforceable, regardless of whether an opt-out provision was present.

were expanded (as the judge did here) to arbitration agreements that permitted employees an opportunity to opt out.

Similarly, ALJ Lisa D. Thompson ruled that an arbitration agreement with an opt-out provision did not violate the Act because it was voluntary. See *Valley Health System*, Case 28-CA-123611 (March 18, 2015). Distinguishing *D.R. Horton* and *Murphy Oil*, Judge Thompson held the arbitration agreement was "voluntary" and therefore lawful because it allowed employees to file unfair labor practice charges with the Board and permitted employees to opt out of arbitration entirely. The judge found the employer's arbitration policy fell "squarely within" the issue left open by *D.R. Horton*.

These decisions mirror those found in the myriad of Federal court decisions which support the contention that class action waivers in arbitration agreements do not infringe upon employees' Section 7 rights, especially when an opt-out provision is present.[2]

The General Counsel's reliance on *AT&T Mobility Services, LLC*, 363 NLRB No. 99, slip op. (2016) and *On Assignment Staffing Services, Inc*., 362 NLRB No. 189, slip op. (2015), does not save his argument. According to the General Counsel, the opt-out provision's requirement that employees affirmatively and openly waive their Section 7 rights is "by definition . . . coercive." (GC Ans. Br. 12). But there is no evidence in the record to support an inference that Respondent forces employees to sign the Agreement without having the ability to utilize the opt-out provision. Moreover, there is no evidence that Respondent retaliates against employees who engage in protected concerted activities. Arbitrarily "defining" the opt-out provision as "coercive" proves nothing.

[2] Respondent's exceptions brief cites to no fewer than *forty* Federal decisions finding that the Board incorrectly decided *D.R. Horton*, *Murphy Oil*, and *On Assignment*. See Respondent's Br. 10-11.

The General Counsel's reliance on *On Assignment* and *AT&T Mobility* also fails for the simple reason that those cases were wrongly decided. In both cases, the Board held that an opt-out provision reasonably tended to interfere with the exercise of Section 7 rights in at least two ways: (1) by requiring that employees take affirmative steps to retain Section 7 rights; and (2) because it requires that employees make an observable choice that demonstrates their support of or rejection of concerted activity." *On Assignment*, 362 NLRB No. 189, slip op. at 4; *AT&T Mobility*, 363 NLRB No. 99, slip op. at 1 fn. 3. Both of these theories are misguided, and consequently, Respondent requests that the Board reconsider the holdings in *On Assignment* and *AT&T Mobility* and not apply the reasoning of those cases here.

First, contrary to the Board's assumptions in *On Assignment* and *AT&T Mobility*, an opt-out procedure is not an "observable choice that demonstrates [an employees'] support for or rejection of concerted activity," nor does it "require [Respondent's] permission to engage in" protected activity. *On Assignment*, 362 NLRB No. 189, slip op. at 4. In essence, *On Assignment* and *AT&T Mobility* create a false presumption that an employee's decision to opt out is itself somehow protected activity. It is not. To be protected by Section 7, activity must be concerted—i.e., taken together by two or more employees or by one employee on behalf of others. See *Five Star Transport*, 349 NLRB 42 (2007). Here, an employee alone makes a decision to opt out of the Agreement. It cannot be said that such a decision is in support or rejection of concerted activity, because it is not "concerted" and is not protected by the Act.

Second, the Agreement at issue in this case does not require employees to take affirmative steps to retain Section 7 rights. As noted above, Section 7 provides that

"[e]mployees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ." 29 U.S.C. § 157. The Board's reasoning in *On Assignment* and *AT&T Mobility* completely ignores this right to *not* participate in concerted activities by assuming that employees are somehow "preserving" Section 7 rights by opting out. Id. Employees who participate in CMSI's dispute resolution process are free to not engage in concerted activities and can make this choice by simply signing the Agreement.

Contrary to the judge's holding and the General Counsel's contention, Respondent's employees have the absolute freedom to choose whether to agree to arbitrate claims on an individual basis. Even assuming, arguendo, that employees have the "right" under Section 7 to pursue claims on a class or collective basis, employees have just as much right under the Act to refuse to do so. To the extent that *On Assignment* and *AT&T Mobility* are considered controlling here, they should be overturned. The Agreement allows employees to freely, and without coercion, decide whether to opt out of a class action waiver. This does not violate Section 7. Numerous Federal courts—including the Ninth Circuit—recognize as much. Consequently, the Board's rationale should not be applied here.

C. The Federal and California State Supreme Courts have Invalidated *D.R. Horton*'s Reasoning

The General Counsel essentially ignores Respondent's logical arguments for why the Board should overturn *D.R Horton* and its progeny. As discussed more fully in Respondent's exceptions brief, the Board has misunderstood and therefore misinterpreted the importance of the Federal Arbitration Act (FAA) and the strong public

policy favoring arbitration agreements. Were this not the case, Federal courts would not have repeatedly refused to apply *D.R. Horton* or adopt its reasoning.

As the Board did in *D.R. Horton*, the judge here failed to properly apply the FAA and appropriate California State law in considering the Agreement's validity. Clear Federal and State Supreme Court precedent hold that the Agreement must be enforced. See, e.g., *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014). Further, California court precedent holds that agreements nearly identical to the Agreement at issue here is enforceable and valid under the California Arbitration Act. See *Nanavati v. Adecco USA, Inc*., 99 F.Supp.3d 1072, 1077-1078 (N.D. Cal. 2015). The judge's failure to recognize and apply these cases was erroneous.

The Board must accept the Federal court interpretation of the FAA. That statute is not one the Board has special expertise to construe and apply. Because the NLRA contains no congressional command indicating that it supersedes the FAA, the judge and the Board must acknowledge the strong policy in favor of arbitrations and reconcile its decisions to follow the same policy, consistent with Supreme Court precedent.[3]

In its answering brief, the General Counsel suggests that the Board does not have a problem with arbitration agreements per se, and that they are only unlawful when they contain class action waivers. The General Counsel then argues that this contention is supported by the FAA, because the "savings clause" found in the FAA allows for

[3] Notably, the NLRA was enacted nearly ten years after the FAA. Congress had the opportunity to include in the Act that it superseded the strong public policy in favor of arbitrations as found in the FAA, but Congress did not do so.

arbitration agreements to be invalidated if they are unlawful or contrary to public policy. See GC Ans. Br. 7; 9 U.S.C. § 2. However, as seen in multiple Federal court decisions, including decisions of the United States Supreme Court, class action waivers in arbitration agreements are not unlawful or contrary to public policy. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

In fact, the General Counsel and the Board are improperly encroaching upon the FAA's principal purpose—to "ensur[e] that private arbitration agreements are enforced according to their terms." Id. (citing *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 664 (2010). The General Counsel's argument that the Act makes portions of the FAA unlawful due to the FAA's "savings clause" would necessarily require the FAA to "destroy itself." See *Concepcion*, 563 U.S. at 343 (citing *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 227–228 (1998)).

Simply put, requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA. *Concepcion*, 563 U.S. at 344. Therefore, the General Counsel's answering arguments are baseless, and the Board must decide this case in accordance with Supreme Court jurisprudence.

D. <u>The Supreme Court Has Not Been Given an Opportunity to Overturn *D.R. Horton*</u>

The General Counsel's brief also argues that because the Supreme Court has not expressly overturned *D.R. Horton*, it is still good law and must be followed. This argument clearly omits one key fact: the Supreme Court never had the opportunity to review the *D.R. Horton* decision, because the General Counsel has not appealed it or any similar

adverse ruling. This is a tacit acknowledgment that *D.R. Horton* will not withstand scrutiny from the Supreme Court, just as it is has not withstood scrutiny from numerous other courts.

Rather than pursuing a writ of certiorari, the Board "doubled down" on its reasoning in *D.R. Horton*—despite the resounding criticism it received from courts. See *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. (2014) (Mem. Johnson, dissent) ("Instead, the [*Murphy Oil*] majority chooses to double down on a mistake that, by now, is blatantly apparent."). Similarly, *Murphy Oil* has not been appealed to the Supreme Court. As a result, *D.R. Horton* could have been reviewed by the Supreme Court, and it remains to be seen whether the Supreme Court will be given the opportunity to review *Murphy Oil*.

The same issue persists with the General Counsel's and the judge's reliance on *On Assignment*, *AT&T Mobility*, and *Solar City Corp.*, 363 NLRB No. 83, slip op. (2015). *Solar City* has been stayed, *at the General Counsel's request*, until an en banc panel of the Fifth Circuit decides *Murphy Oil*. *On Assignment*, and numerous other cases, are undergoing the same rigmarole, having been stayed pending the resolution of *Murphy Oil*. Failing to allow these cases to move forward, and then attempting to rely on them as shields, blatantly disregards the Board's fundamental purpose of protecting employees' Section 7 rights and is inconsistent with Supreme Court precedent allowing for class action waivers in arbitration agreements.

As discussed more fully in Respondent's exceptions brief, clear precedent, including Supreme Court precedent, compels a finding that the Agreement is lawful under the FAA and does not violate Section 7. Likewise, clear California precedent holds that the Agreement is valid under the California Arbitration Act. The Board is not authorized

to ignore the interpretations of these statutes, and must therefore interpret the Act to coexist with these statutes. For these reasons, the General Counsel's arguments should be rejected.

III. CONCLUSION

For the foregoing reasons, and for the reasons stated in Respondent's exceptions and supporting brief, Respondent respectfully requests that the Board reject those excepted-to portions of the judge's Decision. The Agreement does not violate Section 8(a)(1) of the Act, and the complaint should be dismissed.

Respectfully submitted this 26th day of April, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2016, I e-filed Respondent Coastal Marine Services, Inc.'s Reply Brief in Support of Exceptions to the Decision of the Administrative Law Judge, and immediately thereafter served it by electronic mail upon the following:

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